Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

PHYLLIS WOODALL, and Jeannie Coutta, d/b/a The Naked Harem and the Cosmopolitan Club; Hiroyoshi Iwabuchi and Luz Iwabuchi, d/b/a Cabaret; Enrique Villanueva, d/b/a Swinger's Boutique; and Willie Ceniceros, d/b/a Swinger's Cinema,

Petitioners,

vs.

The CITY OF EL PASO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER AREAS IN WHICH VIRTUALLY ALL SIMILAR RETAIL BUSINESSES WOULD BE EXPECTED TO FAIL COULD CONSTITUTE A REASONABLE OPPORTUNITY FOR ADULT BUSINESSES TO OPEN AND OPERATE THEIR BUSINESSES UNDER THE UNITED STATES CONSTITUTION.

WHETHER THE FEDERAL COURTS SHOULD HOLD THAT THE *TEXAS CONSTITUTION* OFFERS NO MORE PROTECTION FOR SPEECH THAN THE *UNITED STATES CONSTITUTION* WHEN THE TEXAS SUPREME COURT HAS HELD THAT IT DOES OFFER MORE PROTECTION AND THE ACTUAL WORDING OF THE TEXAS CONSTITUTION IS MORE EXPANSIVE.

WHETHER THE UNITED STATES COURT OF APPEALS ERRED IN SETTING ASIDE THE VERDICT OF THE EL PASO JURY WHICH FOUND THAT NO REASONABLE OPPORTUNITY TO OPEN AND OPERATE EXISTED IN EL PASO FOR ADULT BUSINESSES.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners petition this Court to grant a Writ of Certiorari reviewing the decision of the United States Court of Appeals for the Fifth Circuit in *Phyllis Woodall et al. v. The City of El Paso et al.*, Nos. 93-8674, 93-8739 and thereafter reverse that decision.

CITATIONS TO OPINION BELOW

The denial of rehearing entered on June 22, 1995, by the United States Court of Appeals for the Fifth Circuit in *Phyllis Woodall et al. v. The City of El Paso et al.*, No. 93-8674, 93-8739 was entered without opinion and unpublished and appears herein as Appendix A. The published opinion of the Fifth Circuit entered on April 14, 1995 reversing the judgment and granting judgment for the Appellees/Respondents in *Phyllis Woodall et al. v. The City of El Paso et al.*, No. 93-8674, 93-8739, appears herein as Appendix B. The Judgment of the District Court for Petitioner's Adult Businesses entered on July 30, 1993, appears as Appendix C. The previous opinion of the Fifth Circuit entered on January 9, 1992 on rehearing in April 21, 1992, appears herein as Appendix D. The opinion of the Fifth Circuit entered on January 9, 1992, in *Phyllis Woodall, et al., Plaintiffs-Appellants v. The CITY OF EL PASO et al., Defendants-Appellees*. No. 90-8269, appears as Appendix E.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on June 22, 1995. This petitioners timely filed within ninety (90) days of June 22, 1995 pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;
>
> ***Constitution of the United States,***
> **First Amendment**

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
>
> ***Constitution of the United States,***
> **Fourteenth Amendment**

Article One, Section Eight of the Constitution of the State of Texas provides in pertinent part that:

> Sec. 8. Every person shall be at liberty to speak, write or publish his opinion on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.
>
> ***Constitution of the State of Texas,***
> **Article 1, Section 8**

STATEMENT OF THE CASE

A. Course And Proceedings Below

This is a civil rights case involving adult bookstores, topless clubs, etc., in El Paso, Texas. This case was removed to Federal Court at the Motion of the City of El Paso, and was subsequently tried to a jury. In the first trial a jury returned a verdict in favor of the City, finding that 39 adult businesses operated in El Paso on March 22, 1988, that the Ordinances allowed for 59 adult businesses sited on 1,165 acres, and that the Ordinances had not denied the Adult Businesses "a reasonable opportunity to open and operate their adult entertainment businesses." After the trial the district court dismissed the Adult Businesses' claim under the Texas Constitution. See *Woodall v. City of El Paso (III)*, printed Slip Opinion (April 14, 1995) at p. 3262. After appeal by the Adult Businesses, the Fifth Circuit reversed in *Woodall v. City of El Paso (I)*, 950 F.2d 1628 (5th Cir. 1992) on the grounds that the jury was improperly instructed so as to render their verdict invalid. Specifically, the Fifth Circuit held that the district court should have instructed the jury (as requested by the Adult Businesses) that land cannot be found to be reasonably available if its physical characteristics (example: flood ponding area) or legal characteristics (example: restrictive covenant prohibiting adult use) made it "impossible" that an adult business to locate there. *Woodall v. City of El Paso (I)*, 950 F.2d 1628 (5th Circuit 1992). Also included in the *Woodall (I)* opinion was an order that the District Court reconsider the Adult Businesses' claims under the *Texas Constitution*. The Fifth Circuit in *Phyllis Woodall, et al. v. The CITY OF EL PASO, et al.*, 959 F.2d

1305 (5th Cir. 1992), modified its opinion somewhat, but still remanded the cause for a new trial.

Upon remand, the District Court first determined that the rights of Adult Businesses under the *Texas Constitution* were identical to those enjoyed by such businesses under the *United States Constitution*. And refused to reinstate those claims upon retrial the following occurred.

> For 1992, the jury found that there were 22 adult businesses in operation, 12 cites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses.
>
> ***Woodall (III),***
> **49 F.3d at 1123**

An appeal was taken by both the City of El Paso as to the verdict on the *United States Constitution* issues and by the Adult businesses as to the refusal of the District Court to hear or determine the Texas Constitutional issues. The Fifth Circuit held the following regarding the appeal of the City of El Paso:

> After a thorough review of the record, we conclude that the jury could only have reached its verdict based on an incorrect view of the law, and that there is no constitutional infirmity with the City's zoning ordinances.
>
> * * *
>
> There is simply no evidence in the record from which a reasonable inference could be drawn that the sites proposed by the City were

> the only sites potentially available. [footnotes omitted]
>
> ***Woodall (III)*,**
> **49 F.3d at 1122, 1126**

The Fifth Circuit made the following decision regarding the cross-appeal of the Adult Businesses regarding the Texas Constitution:

> If the intermediate Texas courts are wrong about Texas law in this area, we are content to wait until Texas Supreme Court corrects their error. We hold that the Adult Businesses' claims under the Texas Constitution should be determined under the same standard as used under the United States Constitution.
>
> ***Woodall (III)*,**
> **49 F.3d at 1128**

B. Statement Of The Facts

The petitioners operate retail adult businesses within the City of El Paso. The businesses include topless bars, topless and nude clubs, and adult bookstores. (TR, I 51, III 80, 82) In 1978, the City of El Paso enacted Ordinance No. 6169 which regulated the location of adult businesses. This ordinance required a 1,000 foot separation between adult businesses and required them to be separated by at least 1,000 feet from churches, schools and residential districts. (Record Excerpts for Appellant, Exhibit "J"). The 1978 ordinance was amended in 1987 by Ordinance No. 8926 to add additional protected uses, including nursery schools, day nurseries, daycare centers and public parks adjacent to residential districts. As amended, it requires that adult businesses be located in

property zoned C-4 or C-5. (TR, II 180) In addition, it prohibits adult businesses from locating within 1,000 feet of the property line of a lot devoted to any residential use, whether the property is in a residential zone or not. (Record Excerpts for Appellant, Exhibit "K"). As amended in March, 1988 by Ordinance No. 9326, it also requires a 1,000 foot separation from universities, business schools and trade schools. (TR, III 169). In March, 1988, there were 39 adult businesses in existence in the City of El Paso. (TR, II 186-189). As a consequence of these ordinances, *all 39 businesses became illegal uses at their existing locations.* (TR, II 191).

The City of El Paso encompasses approximately 158,397 acres. (TR, II 189). In 1988, of the total acreage available in the C-4 and C-5 zones where adult businesses were allowed to locate, only 1135 acres were potentially available for use by adult businesses. (TR, II 203). Of this potentially available acreage, approximately 600 acres were without utilities, roads or development on it. (TR, II 190). The developable land, i.e., that with utilities and roads, approximated three-tenths of one percent (.003) of the entire acreage of the City of El Paso. By 1992, without deducting for land that did not have roads or utilities, only 1397 acres were potentially available for use by adult businesses. (TR, II 203). Using its revised criteria, the City identified 51 sites that it alleged would have been available in 1988 and 64 sites that it alleged were available in 1992. (TR, II 202). While these were not the only possible sites, *the City acknowledges that the locational restrictions of the ordinance removed 72 acres from consideration each time a business did in fact locate.* (TR, II 206). As a

consequence, only a finite number of businesses could locate in the available acreage.

There was substantial evidence offered from which the jury could have concluded that many of the sites identified by the City were not legally or physically available. For example, Petitioner Phyllis Woodall, testified that many of the sites were undeveloped desert and sand dunes that did not have roads or the closest roads dead ended in the middle of nowhere. (TR, I 66-67). Some sites were covered with sagebrush and sinkholes. (TR, I 73). Others had no roads or utilities to them. (TR, I 75, 76). Patricia Adauto, the City's primary witness, testified similarly. She indicated that many of the sites did not have sidewalks, streetlights or other infrastructure improvements. (For example, see TR, II 55, 68, 72, 73, 74, 76, 140, 155). Additionally, the use of some of the sites identified by the City as available was precluded because of deed restrictions the City had failed to identify. (TR, II 49, 60, 85). Some sites with structures, identified as "available," were, in fact, legally unavailable because they had insufficient parking to meet the requirements for adult entertainment uses. (TR, II 67, 90-91). Additionally, it is clear from her testimony, as a whole, that the City made no effort to determine if any of the sites it identified were legally unavailable because they were owner occupied or subject to long term leases. (TR, II 70). Finally, it is clear that the City gave no consideration to the physical unavailability of many sites because of their huge size, present use for other purposes such as large factories and large warehouses and the unreasonableness of destroying existing improvements in order to locate small businesses, such as the Petitioners.

After considering all the evidence, the jury determined that there were 39 adult businesses in operation in the City of El Paso on March 22, 1988, that there were 12 sites reasonably available to them on which to open and operate and that the challenged ordinances effectively denied the Petitioners a reasonable opportunity to open and operate their entertainment businesses. Answering the same questions for November 16, 1992, the jury answered similarly but found only 22 adult businesses in operation on that date. (Record Excerpts for Appellees/ Cross-Appellants, Exhibit "D").

REASONS WHY THE WRIT SHOULD BE GRANTED

A. In General

In this cause, the United States Court of Appeals for the Fifth Circuit overturned a jury verdict in favor of the adult businesses involved in this lawsuit. The Fifth Circuit entered its decision by eschewing commercial viability as being an issue relevant to whether the Adult Businesses were allowed reasonable alternative avenues for expression. The Fifth Circuit clearly held:

> The Adult Businesses' entire case was founded on the premise that it would not be commercially reasonable for an adult business, or more particularly a topless bar, to locate on the alternative sites proposed by the City.
>
> * * *
>
> It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even

> prove commercially unfeasible for an adult business.
>
> * * *
>
> As we have stated time and again, commercial viability is not a relevant consideration. *See id.; Lakeland Lounge*, 973 F.2d at 1260; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).
>
> ***Woodall v. City of El Paso,***
> **49 F.3d 1120, 1123-1124 (5th Cir. 1995)**

This opinion brings to a logical conclusion the Fifth Circuit's extrapolation of the words of this Court in *Renton*:

> We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech." *American Mini Theatres*, 427 U.S., at 71, n. 35, 96 S.Ct., at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.
>
> ***City of Renton v. Playtime Theatres, Inc.,***
> **106 S.Ct. 925, 932 (1986)**

Thus, we are left with the situation whereby Government may regulate speech which ordinarily appears in a commercial context and such regulation may extend to regulating such speech to commercial oblivion. Petitioner

asserts that this should not be the law. While the market place is claimed to be the ultimate judge as to what will survive, if not flourish, this principle has little meaning if Government can alter the playing field to make even survival highly improbable. When we evidence a concern on the effects on regulation on land use, logging, mining, etc., all of which are not constitutionally protected activities, how can we accept that even in spheres which implicate the First Amendment that Government can regulate to probable extinction of the activity. The Petitioners below sought and received a jury verdict of their peers that the El Paso zoning ordinance did not allow them reasonable alternative avenues of communication. The Fifth Circuit not only overturned such verdict, but basically found that the Petitioners could never prove their case. In this case, the evidence is not only sufficient, but uncontradicted in large part because the City of El Paso refused to consider or present any evidence of economic consideration at all. The Petitioners note that Adult Businesses in El Paso have decreased by 50% since the beginning of the enforcement of this ordinance, see Appendix C. The trend is to total elimination of this form of speech in El Paso. It is for this reason, that the Petitioners ask this Honorable Court to grant certiorari.

B. On the Merits of the Federal Constitutional Error

1. The Petitioner's Evidence

The Adult Businesses called as their expert, Jeffrey D. Jones, who testified that of the sites presented by the CITY, that only 11-12 were marginally reasonable, in other words that it was barely possible that a retail use would survive. (TR, II 224 et seq., 237 et seq.). Mr. Jones found the remaining sites to be impossible, that a retail use would not survive. (TR, II 237-242). The teachings of Topanga would exclude these areas as it did when relying on an expert witness in that case:

> The City contends that these experts arrived at their conclusions by considering: 1) the commercial viability of the relocation sites; and 2) whether these sites were actually as opposed to potentially available. The City is correct that at time Mr. Bailey improperly considered factors such as whether relocation sites were operatively expensive or whether adult businesses would not be welcomed by landlords. Notwithstanding this, Mr. Bailey's final estimation of available relocation sites resulted from his reliance on factors other than commercial viability.
>
> Applying the factors we have enumerated above, we believe that the areas eliminated from consideration by Mr. Taugher and Mr. Bailey are properly excluded under *Renton* since these areas do not fall within the relevant market. First, much of the land the Adult Businesses' experts considered unsuitable land is not potentially available. Land under the ocean, airstrips of international airports, and sports stadiums are not relocation sites likely to ever become

> available to the Adult Businesses, or indeed to any commercial business. Second, and turning to those relocation sites which are located in manufacturing zones, many of the areas excluded by Appellees' experts are not readily accessible to the public. Third, many of the sites and Adult Businesses' experts found to be unsuitable are inadequate for any generic commercial business. While *Renton* did not consider *undeveloped* land to be unsuitable for relocation, the Adult businesses' experts testified that the City here has provided the Adult Businesses relocation sites that are *developed* in a manner totally incompatible with *any* average commercial business. Fourth, many of the excluded relation sites appear to lack a proper infra-structure. In short, aside from the question of commercial viability, it is unreasonable to consider the acreage eliminated from consideration by the Adult Businesses' experts as relocation sites that fall within the business real estate market.
>
> ***Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1532 (9th Cir. 1993)**

On the other hand, the CITY never rebutted this testimony and its own expert admitted complete ignorance as to the commercial market place. (TR, II 40, 110; TR, III 179). The Adult Businesses would argue that to order removal of constitutionally-profected uses to areas where they will almost certainly fail is per se unreasonable. As we talk about the economic costs of regulation and balancing those costs in enforcing regulations such as those of the endangered species act which can proscribe unprotected activities such as logging, how can we justify as reasonable the consigning of these constitutionally protected activities to economic oblivion.

2. The Fifth Circuit's Approach to the Evidence

The Fifth Circuit ignores the strictures by which this case was tried. First of all, United States District Judge Bunton refused to try each of the several thousands of leaseholds involved in the 1433 acres alleged to be available by the CITY. The CITY came forward with its representative reasonable location sites and the Adult Businesses refuted the availability of each and every site through the testimony of Petitioner Phyllis Woodall, an owner of Adult Businesses; Patricia Adauto, expert witness for the CITY; and Jeffrey D. Jones, expert appraiser for retail businesses testifying for the Adult Businesses. Ms. Woodall made it clear that she was testifying not just regarding the actual site, but the entire surrounding area. (TR, I 51 et seq.). Likewise, Patricia Adauto was asked after virtually every evaluation regarding the surrounding area. (TR, II 44, 67-68, 78, 81, 98, etc.). In a city of 625,000 plus, there is simply no other way to try this lawsuit within the walls of a Federal Courthouse. The CITY at trial never had the temerity to suggest to the Judge that the Court should try the availability of each parcel, sub-parcel, and lot.

In summary, the evidence establishes that the vast majority of the sites proffered by the CITY as available for adult businesses were undeveloped desert and sand dunes or had no roads or utilities to them. Some sites were covered with sagebrush and sinkholes. Testimony from the City's witnesses indicated that many of the sites did not have sidewalks, streetlight nor other infrastructure improvements. Additionally, the use of some of the sites was precluded because of deed restrictions the CITY

had failed to identify. Other sites with structures identified by the CITY as "available," were, in fact, legally unavailable because they had insufficient parking to meet code requirements. The CITY made no effort to determine if any of the sites it identified were legally unavailable because they were owner occupied or subject long terms leases. Finally, the CITY gave no consideration to the physical unavailability of many sites because of their huge size, present use for other purposes and the unreasonableness of destroying existing improvements in order to locate a small business such as the Petitioners. Viewing these facts in the light most favorable to the Petitioners, and giving them the advantage of the fair and reasonable inferences which the evidence justifies, it is clear that the District Court did not err in denying the CITY's motion for a directed verdict. *Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 (5th Cir. 1992); *Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97 (5th Cir. 1993).

3. Error in the Approach of the Fifth Circuit

The Adult Businesses contend that the evidence even taken in the light most unfavorable to the verdict demonstrated a violation of the Constitution under *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The fact is that each site once taken up by an Adult business consumes, not "one" as this Court held, *Woodall (III)*, at 3265, but "seventy-two (72) acres," according to the CITY's expert, TR, II 206. In *Renton*, a very small city, the following was held to be reasonable for two (2) adult uses:

> In *all* of the 520 acres zoned for adult movie theaters, *Renton* argued that there were over 400 potential adult movie theater sites. Brief for Appellants, *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), (No. 84-1360) (LEXIS), Genfed library, Briefs file.
>
> ***Woodall (I),***
> **950 F.2d 1628, 1633 (5th Cir. 1992)**

How do our facts even taken in the light most unfavorable to the verdict won by the Adult businesses below equal reasonable opportunity under *Renton* when the available sites in El Paso are well less than a hundred even by the CITY's evidence, in a much larger city of some 625,000? The Fifth Circuit simply assumed that any number even marginally above the declining (and we know why) number of Adult businesses was enough to be reasonable under *Renton* and under the Constitution. And the Fifth Circuit did this without saying how many sites it found acting as the jury and how that many sites were reasonable under *Renton*. Such analysis was plainly insufficient.

4. Failure of the City to Preserve Error

Prior to the reading of the Court's charge, the CITY only objected to the failure to give one of its requested charges (TR, III 206-207), but did not object to the Court's anticipated charge. (TR, III 206-207).

Following the Court's charge, the CITY failed to object as required by law.

> Any objections from the plaintiffs to the Court's Charge as given?
>
> [THE COURT]: Well, these are the instructions here. Any Objections from the Defendant?
>
> *[MR. MIRANDA]: No, Your Honor.*
>
> **TR, III 2660-267**

As the CITY admitted in its *Appellant's Brief*, at pp 42-43.

> The jury, however, received only the following instructions from the court relating to the critical issue of whether El Paso had provided Appellees a reasonable opportunity to open and operate:
>
> > In order to determine whether the City of El Paso provided a reasonable opportunity for the plaintiffs to open and operate their business and provided them with reasonable alternative avenues of communication, you must only consider those areas of the city that are part of the relevant real estate market.
> >
> > Land cannot be found to be reasonably available if its physical or legal characteristics make it impossible for any adult businesses to locate there.
> >
> > That is, land areas which are subject to restrictive covenants, zoning conditions or other restrictive documents which preclude its use by adult businesses, should not be considered available.
> >
> > Further, if a property is occupied pursuant to a lease that commits the property to a tenant for its business purposes for a term of years, the property may not be

> available to adult businesses or any other business enterprise.
>
> However, land in manufacturing and industrial zones should be considered available only if it is reasonably accessible to the general public and has a proper infrastructure such as roads and utilities.
>
> Adult business owners must fend for themselves in the real estate market on a equal footing with other prospective purchasers and lessees of space. What this means is that the city must leave enough available area so adult business owners have a reasonable opportunity to purchase or lease real property on which business can be conducted.
>
> Transcript, pp. 3-260 through 3-261. * * *
>
> The jury was, therefore, allowed to apply the wrong legal standard in determining the number of sites and areas that were "reasonably available" for relocation purposes.
>
> ***Appellant's Brief,***
> **at pp. 42-43.**

Thus, the CITY has admitted that the instruction given without objection *allowed* the Jury verdict see *Reeve Bros. v. Guest,* 131 F.2d 710 (5th Cir. 1942); *Williams v. Thomas,* 692 F.2d 1032 (5th Cir. 1982) cert. den., 462 U.S. 1133. As such, any complaint based on the premise that the Fifth Circuit utilized to grant judgment,

> we conclude that the jury could only have reached its verdict based on an incorrect view of the law.
>
> ***Woodall (III),***
> **Slip Opinion at 3261**

– was waived by the failure of the CITY to object to the charge which was given by the Court.

Also, as noted in the Fifth Circuit opinion the CITY did move for a directed verdict at the end of the evidence presented by the Adult Businesses (TR, III 117), *Woodall (III)*, 49 F.3d at 1123; however, subsequently, further evidence was heard (TR, II 119 to III 200), after which, the CITY failed to reurge its motion at the close of all the evidence:

> [MR. GIBSON]: May I have just one moment, one second? Nothing, Your Honor.
>
> [THE COURT]: The plaintiffs close?
>
> [MR. ROBERTS]: We close, Your Honor.
>
> [THE COURT]: Does the defendant close?
>
> [MR. MIRANDA]: Yes, other than for the exhibits, Your Honor.
>
> **TR, III 200**

See also TR, II 200 et seq., see Rule 50 B, *Fed.R.Civ.P.*

> "In considering the appellants' motion for a JNOV, the trial court found as a matter of fact, that the defendants had not made a motion for a directed verdict at the close of all the evidence. It also found that it had not reconsidered its earlier denial of the appellants' motion for a directed verdict made at the close of the plaintiff's case. * * *

> The Ninth Circuit "observe[s] strictly the threshold requirement for a JNOV that a motion for a directed verdict must be made at the close of all the evidence." *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1428 (9th Cir. 1986); see also *Johnson v. Armored Transp. of Cal., Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987). * * * By failing to make a motion for a directed verdict at the close of all of the evidence, "a party cannot question the sufficiency of the evidence either before the district court . . . or on appeal." *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345 (9th Cir. 1986) (quoting *Myers v. Norfolk Livestock Market, Inc.*, 696 F.2d 555, 558 (8th Cir. 1986) (emphasis added)); see also *Herrington*, 834 F.2d at 1500.
>
> ***Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1458-59 (9th Cir. 1988)**

Such matters are cognizable upon rehearing, *United States v. Pierre*, 959 F.2d 1304, 1310 (5th Cir. 1992).

C. On the Merits of the Texas Constitutional Issue

Many years ago in 1988, the Adult Businesses objected to removal to Federal Court particularly because they thought that their State Constitutional grounds would be given "short shrift," and the subsequent course of this case has proved them right. The holding of the plurality in *Ex Parte Tucci*, 859 S.W.2d 1 (Texas 1993), in the context of a "place" restriction on speech, is that any such restriction must be targeted at the effect of expression rather than at the expression itself and that any limitation must represent the least restrictive means to prevent the

alleged harmful effect. *Id.*, at 5-6. In his concurring opinion, Justice Gonzalez found the injunction violative of Article I, Section 8 on narrower grounds:

> I would not require that an indirect restriction on speech be subjected to scrutiny under a "least restrictive means" analysis; I instead would require only that the restriction be narrowly tailored.

859 S.W.2d at 61-62. He went on to modify the federal test for analyzing time, place and manner restrictions on speech, in order to comply with the greater protection of the Texas Constitution, by requiring that the restriction be narrowly tailored to serve a *compelling* governmental interest, as opposed to the requirement of the federal test that the interest be merely substantial. *Id.* at 63.4. Regardless of how the test is formulated, it is clear that 5 members of the Texas Supreme Court have afforded "place" restrictions on speech the greater protection of Article I, Section 8, notwithstanding the protestations of the CITY to the contrary.

The CITY relies exclusively on *Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex.App. 1993) and *Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex.App. 1988) to support its argument that Article I, Section 8 provides greater protection against prior restraints only. The CITY's reliance is misplaced and finds little or no support in those cases. *Maloy* was decided in February 1993, some four months before the decision in *Tucci*. Relying on *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), the court erroneously concluded, as did the District court here, that the greater protection of Article I Section 8 applied only in the case of prior restraints. In light of the decision in

Tucci, that decision was clearly error. Similarly, the decision in *Lindsay* cannot be considered persuasive authority. In *Lindsay*, the court did little more that mention that a claim was raised under Article I, Section 8 of the Texas Constitution. It did not acknowledge the greater protection afforded by Texas Constitution or engage in independent state constitutional analysis. In light of the subsequent clear decisions of the Texas Supreme Court in *Davenport* and *Tucci*, no reliance should be placed on these decisions. In short, the Adult Businesses deserve a meaningful and full examination of the State Constitutional issue whether by certified question to the Texas Court of Appeals or by a detailed, independent analysis based on *Tucci*.

CONCLUSION AND PRAYER

WHEREFORE THE ABOVE PREMISES CONSIDERED, the Petitioners pray that this Honorable Court grant a Writ of Certiorari reviewing the decision of the United States Court of Appeals for the Fifth Circuit and thereafter reverse that decision.

Respectfully submitted,

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Phyllis WOODALL, et al., Plaintiffs,

Phyllis Woodall, et al., Plaintiffs-Appellees,

v.

The CITY OF EL PASO, et al., Defendants,

The City of El Paso, Defendant-Appellant.

Phyllis WOODALL, et al., Plaintiffs,

Phyllis Woodall, Jeannie Coutta d/b/a the Naked Harem, Jedjo, Inc., SMD Enterprises, Inc., d/b/a The Lamplighter d/b/a Red Flame and Marc Diedrich, President, Plaintiffs-Appellants,

v.

The CITY OF EL PASO, et al., Defendants-Appellees.

Nos. 93-8674, 93-8739.

United States Court of Appeals,

Fifth Circuit.

April 14, 1995.

Adult businesses challenged constitutionality of zoning ordinance that restricted their location, claiming that ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court for the Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city and businesses appealed. The Court of Appeals, 950 F.2d 255, reversed and remanded. On remand the District Court, Lucius Desha Bunton, III, J., entered judgment on jury verdict for adult businesses and enjoined enforcement of ordinance, and appeal was taken. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) jury had

improperly determined that there were insufficient locations for adult businesses by counting only sites satisfying ordinance's spatial separation requirements where it would be commercially reasonable for adult business to be conducted; (2) record showed that there were enough sites for all adult businesses if correct standard, counting all sites which met the spatial requirements of ordinance and were not barred by physical characteristics rendering them unavailable for any kind of development or legal characteristics excluding adult businesses, there were sufficient number of spaces for all then existing adult businesses; and (3) there was no higher standard to be satisfied under Texas Constitution than there was under Federal Constitution, before locations of adult businesses could be regulated.

Reversed and remanded.

Appeals from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

At issue in this case is the constitutionality of the City of El Paso's (the City) zoning ordinances (the Ordinances) regulating sexually-oriented or adult businesses. Shortly after the City began enforcing the Ordinances, various adult businesses and adult business owners (the Adult Businesses) filed suit seeking damages and injunctive relief. After this case was tried, appealed, reversed, remanded, and retried, the jury returned a verdict in

favor of the Adult Businesses. The district court entered a judgment awarding damages to the Adult Businesses and enjoining enforcement of the Ordinances against the Adult Businesses. The City appeals, contending that the jury could not have reached the verdict it did under the correct legal standard. The Adult Businesses cross-appeal, contending that the district court erred in applying only federal constitutional standards rather than the greater protections the Adult Businesses claim they enjoy under the Texas Constitution. We decide two issues on appeal: whether the City was entitled to judgment as a matter of law due to the lack of evidence that the Adult Businesses were denied reasonable alternative avenues of communication, and whether Article 1 Section 8 of the Texas Constitution provides greater protection under the circumstances of this case than that provided by the First Amendment to the United States Constitution. After a thorough review of the record, we conclude that the jury could only have reached its verdict based on an incorrect view of the law, and that there is no constitutional infirmity with the City's zoning ordinances. We also hold that the Adult Businesses are entitled to the same protection under the Texas Constitution as under the United States Constitution.

I.

In the 1970s the City of El Paso began passing a series of zoning ordinances regulating sexually-oriented or adult businesses such as adult bookstores, adult movies, topless bars and live nude entertainment establishments. By March, 1988, the Ordinances prohibited these businesses from locating within 1000 feet of churches,

schools, residences, nurseries, parks, and each other. *See* El Paso, Tex.Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code art. II § 20.08.080.A (March 1989).

In April, 1988, El Paso police began ticketing adult businesses which failed to comply with the Ordinances. The Adult Businesses filed suit in state court for damages under 42 U.S.C. § 1983 and for injunctive relief, alleging that the Ordinances violated the First and Fourteenth Amendments of the United States Constitution and Article 1 Section 8 of the Texas Constitution. The City removed the cause to federal court alleging jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Erotic non-obscene printed matter, films, and live entertainment are sheltered by the First Amendment, but enjoy less protection than some other forms of speech, such as political speech. *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir.1994). Although the Constitution looks askance at attempts to regulate such "speech" based solely on its content, we distinguish between regulating the content and regulating the consequence of protected activity. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication. *Id.*

The Adult Businesses stipulated in the first trial that the Ordinances contained facially valid time, place and

manner restrictions, so the only issues presented to the first jury were whether the Ordinances afforded the Adult Businesses reasonable alternative avenues of communication and if not, what damages should be awarded. The jury returned a verdict in favor of the City, finding that 39 adult businesses operated in El Paso on March 22, 1988, that the Ordinances allowed for 59 adult business sites on 1,165 acres, and that the Ordinances had not denied the Adult Businesses "a reasonable opportunity to open and operate their adult entertainment businesses." After the trial the district court dismissed the Adult Businesses' claims under the Texas Constitution.

On appeal, the Adult Businesses argued that the jury had been misled about the proper law to apply in answering the district court's special interrogatories. We reversed and remanded for a new trial, holding that the district court should have instructed the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there. *Woodall v. City of El Paso*, 950 F.2d 255 (5th Cir.1992) (*Woodall I*). We also ordered that the district court reconsider the Adult Businesses' claim under the Texas Constitution. The opinion in *Woodall I* contained a lengthy discussion on the meaning of available land under *Renton*, which suggested that an alternative site is not reasonably available unless it is economically suited to the needs of adult businesses. *See id.* at 260-61.

On rehearing, we reiterated our prior holding that land with physical characteristics which render it

unavailable for any kind of development, or legal characteristics which exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*. *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir.1992) (*Woodall II*). We withdrew our prior discussion regarding economic unavailability and stated that we did not endorse the Adult Businesses' theory that land is not available for use by adult businesses if it would be "unreasonable" to expect adult businesses to relocate there.

Shortly before the second trial, the Adult Businesses filed a motion to reinstate their claims under the Texas Constitution. The district court determined that their rights under the Texas Constitution mirrored those under the United States Constitution and denied the motion. On retrial, the parties again stipulated that the Ordinances were content neutral time, place and manner restrictions and that they served a substantial government interest. The parties also stipulated to the amount of damages to be awarded in the event of an outcome favorable to the Adult Businesses. At the close of the Adult Businesses' evidence, the City moved for directed verdict. The motion was denied and the matter was submitted to the jury. The jury was asked to determine the number of adult businesses in operation in 1988 and 1992, the number of sites and total acreage available in both of those years, and whether the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. For 1988, the jury found that there were 39 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate

their businesses. For 1992, the jury found that there were 22 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. The City timely filed a motion for judgment as a matter of law and for new trial.

The City appealed, contending that the Adult Businesses staked their entire case on principles espoused in *Woodall I*, withdrawn in *Woodall II*, and expressly repudiated in *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir.1992), and that the jury rendered its verdict based on those wrong principles. The Adult Businesses filed a cross appeal, renewing their argument that the Texas Constitution provides them broader protections than the United States Constitution, and alleging that the district court erred in denying their motion to reinstate their claims brought under the Texas Constitution.

II.

A.

The City and the Adult Businesses tried this case under different views of the applicable legal standard. The City approached this case under the theory that a site is available unless it is physically or legally unavailable as we stated in *Woodall II*. The Adult Businesses apparently took their cue from the portion of this Court's opinion in *Woodall I* that was withdrawn in *Woodall II* as "unnecessary" to the Court's decision. The Adult Businesses' position at trial and on appeal has been that a site is only available if it would be commercially reasonable

for an adult business, or, more equivocally, for some hypothetical "generic" retail business that has all the requirements of a topless bar, to locate there. In any event, the Adult Businesses' evidence overwhelmingly concerned whether a topless bar could expect to make a reasonable profit at a particular site.

It is plain after a thorough review of the record that the jury decided this case based on a misapprehension of the questions presented to it. The Adult Businesses' entire case was founded on the premise that it would not be commercially reasonable for an adult business, or more particularly a topless bar, to locate on the alternative sites proposed by the City. This was the theory of the case that the Adult Businesses presented to the jury in their opening statements, it is what the Adult Businesses argued to the jury, and to a lesser extent it is what the Adult Businesses argued on appeal. The Adult Businesses presented extensive evidence upon which a jury could have found that none of the sites suggested by the City were commercially desirable locations for adult businesses, but scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence at all about numerous alternative sites not specifically designated by the City. The jury's verdict is clearly against the great weight of the evidence. The Court must now determine whether the record is so devoid of evidence upon which the jury could have reached its verdict that the City was entitled to a judgment as a matter of law.

In determining whether the district court should have granted the City's motions for judgment as a matter of law, this Court must review the decision of the district court by examining all of the evidence before the jury and

the reasonable inferences drawn from such evidence. The aim of the Court on review is to determine whether a rational jury could reach the conclusion that the jury actually reached. *Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 (5th Cir.1992). If the facts and reasonable inferences therefrom point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict, viewing the facts in the light most favorable to the party against whom the motion is made, and giving that party the advantage of fair and reasonable inferences which the evidence justifies, then a motion for judgment as a matter of law should be granted. *Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97 (5th Cir.1993).

B.

The inquiry into whether the record contains evidence to support the jury's determinations begins with the meaning of the questions the jury was asked to answer. The jury was asked to determine how many alternative sites were reasonably available to the Adult Businesses under the Ordinances, and whether the Ordinances left reasonable alternative avenues of communication. In *Renton*, the Supreme Court set out two principles that infuse successive cases dealing with zoning ordinances restricting permissible locations of adult businesses: (1) the ordinances must allow for reasonable alternative avenues of communication and (2) commercial viability is not a factor. 475 U.S. at 54, 106 S.Ct. at 932. In *Woodall II*, we interpreted *Renton* as standing for the proposition that "land with physical characteristics that render it unavailable for any kind of development, or

legal characteristics that exclude adult businesses, may not be considered 'available' for constitutional purposes under Renton." 959 F.2d at 1306.

Physical availability may be thought of in terms of the cost of altering or developing the area to change its physical characteristics to make it suitable for some generic commercial enterprise. The relevant consideration is whether the physical characteristics of the site present an unreasonable obstacle to opening a business; an obstacle that can be overcome without incurring unreasonable expense does not make a site unavailable, but an obstacle that cannot reasonably be overcome renders the site unavailable. Thus, in determining whether there are sufficient sites available, the finder of fact may exclude land under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on. *See Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1532 (9th Cir.1993). However, the fact that a site may not be commercially desirable does not render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. *Id.* at 1531. There is no requirement that an adult business be able to obtain existing commercial sites at low cost and with market access to ensure its prosperity. *Grand Brittain, Inc. v. City of Amarillo, Texas,* 27 F.3d 1068, 1069 (5th Cir.1994). As we have stated time and again, commercial viability is not a relevant consideration. *See id.; Lakeland Lounge,* 973 F.2d at 1260; *SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir.1988).

C.

The jury found that there were 39 adult businesses in operation in 1988 but only 12 sites available and only 12 acres available, and the jury determined that the Adult Businesses had been denied an opportunity to open and operate their businesses. The City contends that none of the jury's findings for 1988 is supported by the evidence. The jury also found that there were 22 adult businesses in operation in 1992 but only 12 sites reasonably available and only 12 acres available, and determined that the Adult Businesses had been denied a reasonable opportunity to open and operate their businesses. The jury's finding that 22 adult businesses were in operation is unchallenged, but the City contends that the jury's other findings relative to 1992 are unsupported.

Where a zoning ordinance requires that adult businesses maintain a certain distance from one another, merely knowing the number of acres available is not particularly enlightening. Assuming a 1000 foot separation requirement and that each business requires one acre, 100 available acres could support as few as two or as many as 100 locations depending on how the acreage is situated within the city and how the available acreage is utilized. We are therefore not particularly concerned with determining how much acreage was actually available. It is enough to note that the jury's findings on available acreage were clearly based on a misapprehension of the meaning of available land and that the findings find no support in the record. What is important is the number of adult business locations that the acreage will support given the spacing requirements. That is what determines whether there are sufficient alternative sites available,

and that is our focus in reviewing the sufficiency of the evidence.

D.

The City identified 50 specific sites meeting the Ordinances' spacing requirements which it contended were physically and legally available in 1988. The sites were located on 1433 acres of land complying with the Ordinances, though the City did not contend that all 1433 acres were physically and legally available. In addition to the 50 sites identified as available in 1988, the City identified 16 additional sites that had become available due to rezoning that it contended were physically and legally available in 1992 located on 1690 acres of land meeting the zoning requirements.[1] The uncontroverted evidence is that all of the sites specifically identified by the City had road access in 1992, that utilities were put in at the time that the roads were constructed, and that all sites either had existing structures or had no physical impediments to building.[2] The evidence for 1988 was substantially the

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[1] Patricia Aduato (known as Patricia Garcia in *Woodall I*), El Paso's Planning Coordinator, stated that the City had identified 64 sites that were available in 1992, but this is clearly a misstatement. Aduato gave testimony about each of the 66 specific sites that the City contended were available and both the City and the Appellees entered into evidence photographs of all 66 sites.

[2] Phyllis Woodall testified that many areas identified by the City were undeveloped desert with no road access. She testified that some areas did not have roads or the closest roads dead-ended in the middle of nowhere, that some areas were covered with sagebrush and sinkholes, and that some had no utilities; but Woodall never tied her testimony to any of the specific sites

same, except that there was some evidence that three sites may not have had road access in 1988.[3]

The Adult Businesses advanced a number of reasons why they considered various sites unavailable. Some are patently irrelevant. The Adult Businesses claimed that some sites were unavailable because the owner of the site probably would not rent or sell to an adult business, or because the building was currently occupied or leased,[4] neither of which is of any obvious concern under *Renton*.

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identified by the City as available. Indeed she could not, because both the Adult Businesses and the City entered into evidence photographs of the specific sites identified by the City which indisputably show that the sites have road access and that those sites without existing structures have no visible impediments to constructing a building.

[3] Patricia Aduato testified that, although all the roads appeared on 1988 zoning maps, she did not know whether the roads on which three of the proposed sites were located had actually been built at that time.

[4] We suggested in *Woodall I* that: "[When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any business enterprise. Such a leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions." 950 F.2d at 262. In *Topanga Press*, the Ninth Circuit expressed some mystification about this suggestion, but declined to pass on its correctness, and stated that "property is not 'potentially' available when it is unreasonable to believe that it would ever become available to a commercial enterprise." 989 F.2d at 1531. We need not speculate here about what lease terms would make a property unavailable to any commercial enterprise. The record is devoid of evidence that any site was subject to a long term lease, much less one with such terms as would take it out of the commercial real estate market.

Renton's prohibition against consideration of economic impact forecloses inquiry into whether a relocation site is only "potentially" as opposed to "actually" available. *Topanga Press*, 989 F.2d at 1529. The Adult Businesses' complaints about most sites amounted to nothing more than the fact that some of the sites were on less travelled roads or away from other commercial development, though there was no evidence that any site with road access was actually inaccessible to the general public. The Adult Businesses' only real objection to these sites was that they did not believe the locations could generate sufficient business to support a topless bar, which is to say that the Adult Businesses deemed them to be not commercially viable. *See Lakeland Lounge*, 973 F.2d at 1260; *see also D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir.1991) (holding that ordinance that restricted adult businesses to a remote area of town away from other businesses and tourist areas did not violate *Renton*).

The Adult Businesses complained that some sites had existing structures that were unsuitable for any small retail business. In many cases these were large multi-tenant office-warehouse buildings, and the uncontroverted evidence was that retail businesses could and occasionally did locate in such buildings. A few sites were occupied by rather large single use building like a warehouse or factory, which could arguably be outside the commercial real estate market. The Adult Businesses also complained that some sites lacked adequate parking to meet the City's requirements for retail businesses, but made no attempt to show that any site's parking problem

could not be cured at a reasonable cost. The Adult Businesses had other similar complaints about other sites. However, even if we agreed that the these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable.

There is simply no evidence in the record from which a reasonable inference could be drawn that the sites proposed by the City were the only sites potentially available. Rather, the collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the spacing requirements of the Ordinances. The zoning maps show that each site suggested by the City was part of a larger area of potentially available sites, and virtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available. In almost every case, if the suggested site proved physically or legally unavailable, there was another site next door or across the street that was also potentially available.

The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations. Under the circumstances of this case, in order show that the number of adult businesses that could coexist under the Ordinances

was smaller than the number of sites suggested by the City, the Adult Businesses had to show not only that a specific site was unavailable, but that its surrounding area was unavailable as well.

The Court can identify few proposed sites where there was even a suggestion that the site suffered from an impediment that might also reasonably be attributed to the surrounding area. Although Phyllis Woodall testified generally that the areas which the City claimed were available under the Ordinances lacked street access, were covered with sinkholes, or were otherwise unsuitable for any sort of development, the photographs of the specific sites entered into evidence by both sides make it clear that the actual sites suggested by the City and their immediate vicinity were not the areas about which Woodall testified. The record suggests only three situations in which the evidence might support an inference that a specific site and its surrounding area were physically or legally unavailable: three sites and their surrounding areas may have been subject to reciprocal easements barring adult businesses, four sites may have been within 1000 feet of prohibited uses, and three sites might not have had road access in 1988. However, even assuming that there was sufficient evidence to support findings that all the aforementioned areas were actually unavailable, the Ordinances still left a sufficient area physically and legally available for at least forty adult businesses to operate simultaneously in 1988, and for significantly more in 1992. When we compare this with the jury's findings that there were 39 adult businesses in operation in 1988 and only 22 in 1992, we see that, as a matter of

arithmetic, there were at all relevant times more "reasonable" sites available than businesses with demands for them. The Ordinances therefore afforded the Adult Businesses adequate alternative means of communication. *See Lakeland Lounge*, 973 F.2d at 1260.

III.

The Adult Businesses contend that the district court erred in denying their motion to reinstate their claims under Article 1 Section 8 of the Texas Constitution. The Adult Businesses maintain that the standard for determining the validity of El Paso's Ordinances under the Texas Constitution and the United States Constitution are different, and thus they are entitled to pursue a separate claim under Texas Constitution.

Article 1, Section 8 of the Texas Constitution provides in the relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .

Similarly, the First Amendment of the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Texas Supreme Court has held that free speech rights under the Texas Constitution may be broader than those provided by the Federal Constitution in certain

cases. *E.g., Ex Parte Tucci,* 859 S.W.2d 1 (Tex.1993); *Davenport v. Garcia,* 834 S.W.2d 4 (Tex.1992); *O'Quinn v. State Bar of Texas,* 763 S.W.2d 397 (Tex.1988); *Channel 4, KGBT v. Briggs,* 759 S.W.2d 939 (Tex.1988). The Adult Businesses argue that under *Davenport* the free speech clause of the Texas Constitution requires the City to show that the Ordinances protect a "compelling government interest" and are the "least restrictive means" possible to protect this interest, whereas under *Renton* the United States Constitution only requires the City to show that the Ordinances protect a "substantial government interest" and do not "unreasonably limit" alternative avenues of communication.

The district court determined that the greater protections set out in *Davenport* apply only to prior restraints and not to time, place and manner restrictions in land use restrictions of sexually oriented businesses. The district court noted that *Lindsay v. Papageorgiou,* 751 S.W.2d 544 (Tex.App. – Houston [1st Dist.] 1988, writ denied), the only Texas case directly on point, held that the *Renton* standard applies under Texas Constitution as well as under the United States Constitution. The Adult Businesses contend that the *Davenport* standard was extended to land-use cases in *Ex Parte Tucci,* 859 S.W.2d 1, and that *Lindsay* has been impliedly overruled. We are unpersuaded.

In *Tucci,* a plurality of Justices held that the *Davenport* standard should have been applied to a temporary restraining order which regulated abortion protest during the 1992 Republican Party Convention in Houston, Texas. The *Tucci* Court addressed the applicability of *Davenport* to restrictions on political protest. It did not address

whether the more stringent standard was applicable in land-use cases involving adult businesses. The simple fact of the matter is that there is no direct Texas authority supporting the Adult Businesses' position that the *Davenport* standard should be expanded to land-use cases involving adult businesses, and the only Texas authority directly on point opted for the *Renton* standard. *See Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex.App. – Houston [1st Dist.] 1988, writ denied), *see also Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex.App. – Fort Worth 1993, no writ). If the intermediate Texas courts are wrong about Texas law in this area, we are content to wait until the Texas Supreme Court corrects their error. We hold that the Adult Businesses' claims under the Texas Constitution should be determined under the same standard as used under the United States Constitution.

IV.

We conclude that the City was entitled to judgment as a matter of law, and that the district court did not err in denying the Adult Businesses' motion to reinstate their claims under the Texas Constitution. We therefore REVERSE and REMAND with instructions to dissolve the injunction entered by the district court prohibiting enforcement of the Ordinances and for entry of judgment in accordance with this opinion.

Phyllis WOODALL, et al., Plaintiffs,

Phyllis Woodall, et al., Plaintiffs-Appellees,

v.

The CITY OF EL PASO, et al., Defendants,

The City of El Paso, Defendant-Appellant.

Phyllis WOODALL, et al., Plaintiffs,

Phyllis Woodall, Jeannie Coutta d/b/a the Naked Harem, Jedjo, Inc., SMD Enterprises, Inc., d/b/a The Lamplighter d/b/a Red Flame and Marc Diedrich, President, Plaintiffs-Appellants,

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The CITY OF EL PASO, et al., Defendants-Appellees.

Nos. 93-8674, 93-8739.

United States Court of Appeals,
Fifth Circuit.

April 14, 1995.

Adult businesses challenged constitutionality of zoning ordinance that restricted their location, claiming that ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court for the Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city and businesses appealed. The Court of Appeals, 950 F.2d 255, reversed and remanded. On remand the District Court, Lucius Desha Bunton, III, J., entered judgment on jury

verdict for adult businesses and enjoined enforcement of ordinance, and appeal was taken. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) jury had improperly determined that there were insufficient locations for adult businesses by counting only sites satisfying ordinance's spatial separation requirements where it would be commercially reasonable for adult business to be conducted; (2) record showed that there were enough sites for all adult businesses if correct standard, counting all sites which met the spatial requirements of ordinance and were not barred by physical characteristics rendering them unavailable for any kind of development or legal characteristics excluding adult businesses, there were sufficient number of spaces for all then existing adult businesses; and (3) there was no higher standard to be satisfied under Texas Constitution than there was under Federal Constitution, before locations of adult businesses could be regulated.

Reversed and remanded.

Michael R. Gibson, El Paso, TX, for Phyllis Woodall in No. 93-8674.

Jack Burns, Charles Louis Roberts, El Paso, TX, for Marc Diedrich, et al. in No. 93-8674.

Jack R. Burns, Bellevue, WA, for appellants in No. 93-8739.

Eduardo Miranda, Cheryl Jackson, El Paso, TX, for City of El Paso, et al.

Appeals from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

At issue in this case is the constitutionality of the City of El Paso's (the City) zoning ordinances (the Ordinances) regulating sexually-oriented or adult businesses. Shortly after the City began enforcing the Ordinances, various adult businesses and adult business owners (the Adult Businesses) filed suit seeking damages and injunctive relief. After this case was tried, appealed, reversed, remanded, and retried, the jury returned a verdict in favor of the Adult Businesses. The district court entered a judgment awarding damages to the Adult Businesses and enjoining enforcement of the Ordinances against the Adult Businesses. The City appeals, contending that the jury could not have reached the verdict it did under the correct legal standard. The Adult Businesses cross-appeal, contending that the district court erred in applying only federal constitutional standards rather than the greater protections the Adult Businesses claim they enjoy under the Texas Constitution. We decide two issues on appeal: whether the City was entitled to judgment as a matter of law due to the lack of evidence that the Adult Businesses were denied reasonable alternative avenues of communication, and whether Article 1 Section 8 of the Texas Constitution provides greater protection under the circumstances of this case than that provided by the First Amendment to the United States Constitution. After a thorough review of the record, we conclude that the jury could only have reached its verdict based on an incorrect view of the law, and that there is no constitutional infirmity with the City's zoning ordinances. We also hold that

the Adult Businesses are entitled to the same protection under the Texas Constitution as under the United States Constitution.

I.

In the 1970s the City of El Paso began passing a series of zoning ordinances regulating sexually-oriented or adult businesses such as adult bookstores, adult movies, topless bars and live nude entertainment establishments. By March, 1988, the Ordinances prohibited these businesses from locating within 1000 feet of churches, schools, residences, nurseries, parks, and each other. *See* El Paso, Tex.Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code art. II § 20.08.080.A (March 1989).

In April, 1988, El Paso police began ticketing adult businesses which failed to comply with the Ordinances. The Adult Businesses filed suit in state court for damages under 42 U.S.C. § 1983 and for injunctive relief, alleging that the Ordinances violated the First and Fourteenth Amendments of the United States Constitution and Article 1 Section 8 of the Texas Constitution. The City removed the cause to federal court alleging jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Erotic non-obscene printed matter, films, and live entertainment are sheltered by the First Amendment, but enjoy less protection than some other forms of speech, such as political speech. *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 707 (5th Cir.1994). Although the Constitution looks askance at attempts to regulate such "speech" based solely on its content, we distinguish

between regulating the content and regulating the consequence of protected activity. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication. *Id.*

The Adult Businesses stipulated in the first trial that the Ordinances contained facially valid time, place and manner restrictions, so the only issues presented to the first jury were whether the Ordinances afforded the Adult Businesses reasonable alternative avenues of communication and if not, what damages should be awarded. The jury returned a verdict in favor of the City, finding that 39 adult businesses operated in El Paso on March 22, 1988, that the Ordinances allowed for 59 adult business sites on 1,165 acres, and that the Ordinances had not denied the Adult Businesses "a reasonable opportunity to open and operate their adult entertainment businesses." After the trial the district court dismissed the Adult Businesses' claims under the Texas Constitution.

On appeal, the Adult Businesses argued that the jury had been misled about the proper law to apply in answering the district court's special interrogatories. We reversed and remanded for a new trial, holding that the district court should have instructed the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there. *Woodall v. City of El Paso*, 950 F.2d 255 (5th Cir.1992) (*Woodall I*). We also ordered that the

district court reconsider the Adult Businesses' claim under the Texas Constitution. The opinion in *Woodall I* contained a lengthy discussion on the meaning of available land under *Renton*, which suggested that an alternative site is not reasonably available unless it is economically suited to the needs of adult businesses. *See id.* at 260-61.

On rehearing, we reiterated our prior holding that land with physical characteristics which render it unavailable for any kind of development, or legal characteristics which exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*. *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir.1992) (*Woodall II*). We withdrew our prior discussion regarding economic unavailability and stated that we did not endorse the Adult Businesses' theory that land is not available for use by adult businesses if it would be "unreasonable" to expect adult businesses to relocate there.

Shortly before the second trial, the Adult Businesses filed a motion to reinstate their claims under the Texas Constitution. The district court determined that their rights under the Texas Constitution mirrored those under the United States Constitution and denied the motion. On retrial, the parties again stipulated that the Ordinances were content neutral time, place and manner restrictions and that they served a substantial government interest. The parties also stipulated to the amount of damages to be awarded in the event of an outcome favorable to the Adult Businesses. At the close of the Adult Businesses' evidence, the City moved for directed verdict. The motion was denied and the matter was submitted to the

jury. The jury was asked to determine the number of adult businesses in operation in 1988 and 1992, the number of sites and total acreage available in both of those years, and whether the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. For 1988, the jury found that there were 39 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. For 1992, the jury found that there were 22 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. The City timely filed a motion for judgment as a matter of law and for new trial.

The City appealed, contending that the Adult Businesses staked their entire case on principles espoused in *Woodall I*, withdrawn in *Woodall II*, and expressly repudiated in *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir.1992), and that the jury rendered its verdict based on those wrong principles. The Adult Businesses filed a cross appeal, renewing their argument that the Texas Constitution provides them broader protections than the United States Constitution, and alleging that the district court erred in denying their motion to reinstate their claims brought under the Texas Constitution.

II.

A.

The City and the Adult Businesses tried this case under different views of the applicable legal standard. The City approached this case under the theory that a site is available unless it is physically or legally unavailable as we stated in *Woodall II*. The Adult Businesses apparently took their cue from the portion of this Court's opinion in *Woodall I* that was withdrawn in *Woodall II* as "unnecessary" to the Court's decision. The Adult Businesses' position at trial and on appeal has been that a site is only available if it would be commercially reasonable for an adult business, or, more equivocally, for some hypothetical "generic" retail business that has all the requirements of a topless bar, to locate there. In any event, the Adult Businesses' evidence overwhelmingly concerned whether a topless bar could expect to make a reasonable profit at a particular site.

It is plain after a thorough review of the record that the jury decided this case based on a misapprehension of the questions presented to it. The Adult Businesses' entire case was founded on the premise that it would not be commercially reasonable for an adult business, or more particularly a topless bar, to locate on the alternative sites proposed by the City. This was the theory of the case that the Adult Businesses presented to the jury in their opening statements, it is what the Adult Businesses argued to the jury, and to a lesser extent it is what the Adult Businesses argued on appeal. The Adult Businesses presented extensive evidence upon which a jury could have found that none of the sites suggested by the City were

commercially desirable locations for adult businesses, but scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence at all about numerous alternative sites not specifically designated by the City. The jury's verdict is clearly against the great weight of the evidence. The Court must now determine whether the record is so devoid of evidence upon which the jury could have reached its verdict that the City was entitled to a judgment as a matter of law.

In determining whether the district court should have granted the City's motions for judgment as a matter of law, this Court must review the decision of the district court by examining all of the evidence before the jury and the reasonable inferences drawn from such evidence. The aim of the Court on review is to determine whether a rational jury could reach the conclusion that the jury actually reached. *Fields v. J.C. Penney Co.*, 968 F.2d 533, 536 (5th Cir.1992). If the facts and reasonable inferences therefrom point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict, viewing the facts in the light most favorable to the party against whom the motion is made, and giving that party the advantage of fair and reasonable inferences which the evidence justifies, then a motion for judgment as a matter of law should be granted. *Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97 (5th Cir.1993).

B.

The inquiry into whether the record contains evidence to support the jury's determinations begins with

the meaning of the questions the jury was asked to answer. The jury was asked to determine how many alternative sites were reasonably available to the Adult Businesses under the Ordinances, and whether the Ordinances left reasonable alternative avenues of communication. In *Renton*, the Supreme Court set out two principles that infuse successive cases dealing with zoning ordinances restricting permissible locations of adult businesses: (1) the ordinances must allow for reasonable alternative avenues of communication and (2) commercial viability is not a factor. 475 U.S. at 54, 106 S.Ct. at 932. In *Woodall II*, we interpreted *Renton* as standing for the proposition that "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered 'available' for constitutional purposes under *Renton*." 959 F.2d at 1306.

Physical availability may be thought of in terms of the cost of altering or developing the area to change its physical characteristics to make it suitable for some generic commercial enterprise. The relevant consideration is whether the physical characteristics of the site present an unreasonable obstacle to opening a business: an obstacle that can be overcome without incurring unreasonable expense does not make a site unavailable, but an obstacle that cannot reasonably be overcome renders the site unavailable. Thus, in determining whether there are sufficient sites available, the finder of fact may exclude land under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper

infrastructure, and so on. *See Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1532 (9th Cir.1993). However, the fact that a site may not be commercially desirable does not render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. *Id.* at 1531. There is no requirement that an adult business be able to obtain existing commercial sites at low cost and with market access to ensure its prosperity. *Grand Brittain, Inc. v. City of Amarillo, Texas,* 27 F.3d 1068, 1069 (5th Cir.1994). As we have stated time and again, commercial viability is not a relevant consideration. *See id.; Lakeland Lounge,* 973 F.2d at 1260; SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir.1988).

C.

The jury found that there were 39 adult businesses in operation in 1988 but only 12 sites available and only 12 acres available, and the jury determined that the Adult Businesses had been denied an opportunity to open and operate their businesses. The City contends that none of the jury's findings for 1988 is supported by the evidence. The jury also found that there were 22 adult businesses in operation in 1992 but only 12 sites reasonably available and only 12 acres available, and determined that the Adult Businesses had been denied a reasonable opportunity to open and operate their businesses. The jury's finding that 22 adult businesses were in operation is unchallenged, but the City contends that the jury's other findings relative to 1992 are unsupported.

Where a zoning ordinance requires that adult businesses maintain a certain distance from one another, merely knowing the number of acres available is not particularly enlightening. Assuming a 1000 foot separation requirement and that each business requires one acre, 100 available acres could support as few as two or as many as 100 locations depending on how the acreage is situated within the city and how the available acreage is utilized. We are therefore not particularly concerned with determining how much acreage was actually available. It is enough to note that the jury's findings on available acreage were clearly based on a misapprehension of the meaning of available land and that the findings find no support in the record. What is important is the number of adult business locations that the acreage will support given the spacing requirements. That is what determines whether there are sufficient alternative sites available, and that is our focus in reviewing the sufficiency of the evidence.

D.

The City identified 50 specific sites meeting the Ordinances' spacing requirements which it contended were physically and legally available in 1988. The sites were located on 1433 acres of land complying with the Ordinances, though the City did not contend that all 1433 acres were physically and legally available. In addition to the 50 sites identified as available in 1988, the City identified 16 additional sites that had become available due to rezoning that it contended were physically and legally available in 1992 located on 1690 acres of land meeting

the zoning requirements.[1] The uncontroverted evidence is that all of the sites specifically identified by the City had road access in 1992, that utilities were put in at the time that the roads were constructed, and that all sites either had existing structures or had no physical impediments to building.[2] The evidence for 1988 was substantially the same, except that there was some evidence that three sites may not have had road access in 1988.[3]

The Adult Businesses advanced a number of reasons why they considered various sites unavailable. Some are patently irrelevant. The Adult Businesses claimed that some sites were unavailable because the owner of the site

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[1] Patricia Aduato (known as Patricia Garcia in *Woodall I*), El Paso's Planning Coordinator, stated that the City had identified 64 sites that were available in 1992, but this is clearly a misstatement. Aduato gave testimony about each of the 66 specific sites that the City contended were available and both the City and the Appellees entered into evidence photographs of all 66 sites.

[2] Phyllis Woodall testified that many areas identified by the City were undeveloped desert with no road access. She testified that some areas did not have roads or the closest roads dead-ended in the middle of nowhere, that some areas were covered with sagebrush and sinkholes, and that some had no utilities; but Woodall never tied her testimony to any of the specific sites identified by the City as available. Indeed she could not, because both the Adult Businesses and the City entered into evidence photographs of the specific sites identified by the City which indisputably show that the sites have road access and that those sites without existing structures have no visible impediments to constructing a building.

[3] Patricia Aduato testified that, although all the roads appeared on 1988 zoning maps, she did not know whether the roads on which three of the proposed sites were located had actually been built at that time.

probably would not rent or sell to an adult business, or because the building was currently occupied or leased,[4] neither of which is of any obvious concern under *Renton*. *Renton's* prohibition against consideration of economic impact forecloses inquiry into whether a relocation site is only "potentially" as opposed to "actually" available. *Topanga Press*, 989 F.2d at 1529. The Adult Businesses' complaints about most sites amounted to nothing more than the fact that some of the sites were on less travelled roads or away from other commercial development, though there was no evidence that any site with road access was actually inaccessible to the general public. The Adult Businesses' only real objection to these sites was that they did not believe the locations could generate sufficient business to support a topless bar, which is to say that the Adult Businesses deemed them to be not commercially viable. *See Lakeland Lounge*, 973 F.2d at 1260; *see also D.G. Restaurant Corporation v. City of Myrtle Beach*,

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[4] We suggested in *Woodall I* that: "[When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any business enterprise. Such a leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions." 950 F.2d at 262. In *Topanga Press*, the Ninth Circuit expressed some mystification about this suggestion, but declined to pass on its correctness, and stated that "property is not 'potentially' available when it is unreasonable to believe that it would ever become available to a commercial enterprise." 989 F.2d at 1531. We need not speculate here about what lease terms would make a property unavailable to any commercial enterprise. The record is devoid of evidence that any site was subject to a long term lease, much less one with such terms as would take it out of the commercial real estate market.

953 F.2d 140 (4th Cir.1991) (holding that ordinance that restricted adult businesses to a remote area of town away from other businesses and tourist areas did not violate *Renton*).

The Adult Businesses complained that some sites had existing structures that were unsuitable for any small retail business. In many cases these were large multi-tenant office-warehouse buildings, and the uncontroverted evidence was that retail businesses could and occasionally did locate in such buildings. A few sites were occupied by rather large single use building like a warehouse or factory, which could arguably be outside the commercial real estate market. The Adult Businesses also complained that some sites lacked adequate parking to meet the City's requirements for retail businesses, but made no attempt to show that any site's parking problem could not be cured at a reasonable cost. The Adult Businesses had other similar complaints about other sites. However, even if we agreed that the [sic] these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable.

There is simply no evidence in the record from which a reasonable inference could be drawn that the sites proposed by the City were the only sites potentially available. Rather, the collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the spacing requirements of the Ordinances. The zoning maps show that each site suggested by the City was part of a larger

area of potentially available sites, and virtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available. In almost every case, if the suggested site proved physically or legally unavailable, there was another site next door or across the street that was also potentially available.

The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations. Under the circumstances of this case, in order show that the number of adult businesses that could coexist under the Ordinances was smaller than the number of sites suggested by the City, the Adult Businesses had to show not only that a specific site was unavailable, but that its surrounding area was unavailable as well.

The Court can identify few proposed sites where there was even a suggestion that the site suffered from an impediment that might also reasonably be attributed to the surrounding area. Although Phyllis Woodall testified generally that the areas which the City claimed were available under the Ordinances lacked street access, were covered with sinkholes, or were otherwise unsuitable for any sort of development, the photographs of the specific sites entered into evidence by both sides make it clear that the actual sites suggested by the City and their immediate vicinity were not the areas about which Woodall testified. The record suggests only three situations in

which the evidence might support an inference that a specific site and its surrounding area were physically or legally unavailable: three sites and their surrounding areas may have been subject to reciprocal easements barring adult businesses, four sites may have been within 1000 feet of prohibited uses, and three sites might not have had road access in 1988. However, even assuming that there was sufficient evidence to support findings that all the aforementioned areas were actually unavailable, the Ordinances still left a sufficient area physically and legally available for at least forty adult businesses to operate simultaneously in 1988, and for significantly more in 1992. When we compare this with the jury's findings that there were 39 adult businesses in operation in 1988 and only 22 in 1992, we see that, as a matter of arithmetic, there were at all relevant times more "reasonable" sites available than businesses with demands for them. The Ordinances therefore afforded the Adult Businesses adequate alternative means of communication. *See Lakeland Lounge*, 973 F.2d at 1260.

III.

The Adult Businesses contend that the district court erred in denying their motion to reinstate their claims under Article 1 Section 8 of the Texas Constitution. The Adult Businesses maintain that the standard for determining the validity of El Paso's Ordinances under the Texas Constitution and the United States Constitution are different, and thus they are entitled to pursue a separate claim under Texas Constitution.

Article 1, Section 8 of the Texas Constitution provides in the relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .

Similarly, the First Amendment of the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Texas Supreme Court has held that free speech rights under the Texas Constitution may be broader than those provided by the Federal Constitution in certain cases. *E.g., Ex Parte Tucci,* 859 S.W.2d 1 (Tex.1993); *Davenport v. Garcia,* 834 S.W.2d 4 (Tex.1992); *O'Quinn v. State Bar of Texas,* 763 S.W.2d 397 (Tex.1988); *Channel 4, KGBT v. Briggs,* 759 S.W.2d 939 (Tex.1988). The Adult Businesses argue that under *Davenport* the free speech clause of the Texas Constitution requires the City to show that the Ordinances protect a "compelling government interest" and are the "least restrictive means" possible to protect this interest, whereas under *Renton* the United States Constitution only requires the City to show that the Ordinances protect a "substantial government interest" and do not "unreasonably limit" alternative avenues of communication.

The district court determined that the greater protections set out in *Davenport* apply only to prior restraints and not to time, place and manner restrictions in land use

restrictions of sexually oriented businesses. The district court noted that *Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex.App. – Houston [1st Dist.] 1988, writ denied), the only Texas case directly on point, held that the *Renton* standard applies under Texas Constitution as well as under the United States Constitution. The Adult Businesses contend that the *Davenport* standard was extended to land-use cases in *Ex Parte Tucci*, 859 S.W.2d 1, and that *Lindsay* has been impliedly overruled. We are unpersuaded.

In *Tucci*, a plurality of Justices held that the *Davenport* standard should have been applied to a temporary restraining order which regulated abortion protest during the 1992 Republican Party Convention in Houston, Texas. The *Tucci* Court addressed the applicability of *Davenport* to restrictions on political protest. It did not address whether the more stringent standard was applicable in land-use cases involving adult businesses. The simple fact of the matter is that there is no direct Texas authority supporting the Adult Businesses' position that the *Davenport* standard should be expanded to land-use cases involving adult businesses, and the only Texas authority directly on point opted for the *Renton* standard. *See Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex.App. – Houston [1st Dist.] 1988, writ denied), *see also Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex.App. – Fort Worth 1993, no writ). If the intermediate Texas courts are wrong about Texas law in this area, we are content to wait until the Texas Supreme Court corrects their error. We hold that the Adult Businesses' claims under the Texas Constitution should be determined under the same standard as used under the United States Constitution.

IV.

We conclude that the City was entitled to judgment as a matter of law, and that the district court did not err in denying the Adult Businesses' motion to reinstate their claims under the Texas Constitution. We therefore REVERSE and REMAND with instructions to dissolve the injunction entered by the district court prohibiting enforcement of the Ordinances and for entry of judgment in accordance with this opinion.

Phyllis WOODALL, et al.,
Plaintiffs-Appellants,

v.

The CITY OF EL PASO, et al.,
Defendants-Appellees.

No. 90-8269.

United States Court of Appeals,

Fifth Circuit.

April 21, 1992.

Adult businesses brought action challenging constitutionality of zoning ordinance that restricted their location, claiming that ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court, Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city, and businesses appealed. The Court of Appeals, 950 F.2d 255, reversed and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that jury should have been instructed that land with physical characteristics rendering it unavailable for any type of development, or legal characteristics that exclude adult businesses, may not be considered "available" for purposes of First Amendment's requirement that city permit reasonable opportunity for operation of adult businesses within city.

Rehearing granted in part and denied in part, rehearing en banc denied.

Charles Louis Roberts, El Paso, Tex., Jack R. Burns, Bellevue, Wash., for Jedio, et al.

Michael R. Gibson, El Paso, Tex., for Woodall.

Richard Lovelace, El Paso, Tex., for Iwabichi, et al.

Eduardo Miranda, City Atty's Office, Carlos Rincon, Asst. City Atty., El Paso, Tex., for City of El Paso.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 9, 1992, 5th Cir.1992, 950 F.2d 255)

Before REAVLEY and JONES, Circuit Judges.*

PER CURIAM:

The court withdraws its discussion entitled "Unavailable Land under *Renton*" contained in Part A of its opinion (950 F.2d at 258) because the court regards that discussion unnecessary to decide this case. The cross-reference from the remainder of the opinion back to Part II.A (*id.* at 262) should also be considered deleted.

We reiterate, however, our conclusion that the jury received an inadequate instruction under the facts of this case. The record offers no clue as to how the jury determined what land not foreclosed to adult businesses by El Paso's ordinance was physically or legally impossible for

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* Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992, and therefore, did not participate in this decision. This matter is being decided by quorum. 28 U.S.C. 46(d).

them to locate upon.[1] It appears that many acres offered by the city partook of such disabling physical or legal characteristics, yet the jury's findings bear no resemblance whatever to any conceivable theory of inclusion or exclusion of such parcels.

In so holding, we do not endorse appellants' formulation that land is not available for use by the adult businesses if it would be "unreasonable" to expect adult businesses to relocate there. Rather, the jury should have been instructed, in addition to the substance of the charge given, that land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*. *Renton* held that "the First Amendment requires only that [El Paso] refrain from effectively denying [appellants] a reasonable opportunity to open and operate [adult businesses] within the city. . . . " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986). When *Renton* stated that the theater owners "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees," *id*,, the Court obviously contemplated that there was a "market" in which businesses could purchase or lease real property on which business could be conducted. A real estate market that provides no opportunity to compete cannot provide a

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[1] The adult businesses made no contention on, and we do not address, the relationship between the economics of site location and the constitutionality of an adult business zoning ordinance.

reasonable opportunity to do so. Cities that allocate only land that is completely unsuitable from a legal or physical standpoint for adult business use do exactly what the court proscribed in *Renton: effectively* suppress protected speech.

The petition for rehearing is otherwise DENIED. A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Phyllis WOODALL, et al.,
Plaintiffs-Appellants,

v.

The CITY OF EL PASO, et al.,
Defendants-Appellees.

No. 90-8269.

United States Court of Appeals,
Fifth Circuit.

Jan. 9, 1992.

Adult businesses challenged constitutionality of zoning ordinance that restricted their location, claiming that the ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court for the Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city, and businesses appealed. The Court of Appeals, Reavley, Circuit Judge, held that land cannot be found to be reasonably available as alternative site if its physical or legal characteristics make it impossible for any adult business to locate there.

Reversed and remanded.

Charles Louis Roberts, El Paso, Tex., Jack R. Burns, Bellevue, Wash., for Jedjo, et al.

Michael R. Gibson, El Paso, Tex., for Woodall.

Richard Lovelace, El Paso, Tex., for Iwabichi, et al.

Eduardo Miranda, City Atty's. Office, Carlos Rincon, Asst. City Atty., El Paso, Tex., for City of El Paso.

Appeals from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, REAVLEY and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

Appellants contend that the City of El Paso unconstitutionally abridged their speech rights under the Texas and United States constitutions by enacting excessively restrictive zoning ordinances. The district court dismissed their case in accordance with a jury's verdict that El Paso's ordinances do not effectively deny them a reasonable opportunity to open and operate their adult businesses. Because we fault the district court's instructions to the jury, we reverse the court's judgment and remand this case for further proceedings.

I. BACKGROUND

Appellants operate bars, bookstores, and movie theaters in El Paso which convey sexually-oriented, though non-obscene, expression to patrons (adult businesses). El Paso's city council enacted a series of zoning ordinances (the Ordinances) by March 1988 which prohibit these businesses from locating within 1,000 feet of churches, schools, residences, nurseries, parks, and each other. *See* El Paso, Tex., Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code art. II § 20.08.080.A (March 1989). El Paso police began ticketing adult businesses, which were all required to relocate under the Ordinances, in April 1988. Appellants responded with this suit in which they claim that the Ordinances unconstitutionally

confine their freedom of expression. They seek an injunction against the Ordinances' enforcement and damages.

Appellants' challenge to the Ordinances mirrors those of other adult business owners in other cities. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41-46, 106 S.Ct. 925, 926-28, 89 L.Ed.2d 29 (1986); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276-77 (5th Cir.1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989). Because these cases have decided the threshold issues in adult business zoning litigation, the parties stipulated that the Ordinances abridge protected speech, but do so to serve the substantial governmental interest of curbing the crime and urban blight associated with adult businesses. The only issue that the parties present in this case is whether the Ordinances allow appellants reasonable alternative avenues of communication.

At trial, the parties presented evidence of their respective positions on the number of adult business sites and amount of acreage that comply with the Ordinances. Patricia Garcia, El Paso's Planning Coordinator, testified that the Ordinances permit 78 adult business sites on 1,433, or 0.91%, of El Paso's 158,000 acres. Appellants then offered expert testimony to show that it is impossible for them to relocate on most of these 1,433 acres.

The only instruction that the district court gave to guide the jury in deciding what alternative land was reasonably available to the adult businesses closed by the Ordinance stated:

> [f]or the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to lawful speech," the First Amendment does not compel the City of El Paso to insure adult entertainment businesses, or any other kind of speech related businesses, will be able to obtain sites at bargain prices.

The jury found that 39 adult businesses operated in El Paso on March 22, 1988, the Ordinances allow for 59 adult business sites on 1,165 acres, and the Ordinances do not deny appellants "a reasonable opportunity to open and operate their adult entertainment businesses." The district court upheld the Ordinances' constitutionality pursuant to the jury's verdict.

II. DISCUSSION

Appellants claim, *inter alia*, that the portion of the court's jury charge previously quoted misled the jury about the proper law to apply in answering the court's special interrogatories. They asked the court to instruct the jury not to consider land to be available as an alternative avenue of communication for speech affected by the Ordinances if it would be unreasonable to expect adult

businesses to relocate on the land from a physical, legal, or economic standpoint. Instead, the court gave the instruction previously quoted.

El Paso contends that the instruction was not improper, arguing that the instruction was taken verbatim from the Supreme Court's holding in *Renton*. El Paso also urges that the instructions were sufficient considering the entire charge and that counsel were allowed to argue unreasonableness to the jury.

A. Unavailable Land Under *Renton*

"[T]he First Amendment requires only that [El Paso] refrain from *effectively* denying [appellants] a reasonable opportunity to open and operate [adult businesses] within the city. . . . " *Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (emphasis added). Appellants argue that any land that is "completely unsuited" for use as an adult business is as effectively denied to them by the Ordinances, citing *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir.1982). Based on this authority, appellants conclude that none of the following places offer them a reasonable opportunity to open and operate their adult businesses: 1) industrial warehouse areas; 2) drainage areas on which El Paso would permit no business to build; 3) areas where topography makes it impossible or impractical to build; 4) land subject to restrictive covenants that exclude adult businesses;[1] 5) airport land owned by El Paso that, as a

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[1] In his concurrence to *Reitman v. Mulkey*, 387 U.S. 369, 385, 87 S.Ct. 1627, 1636, 18 L.Ed.2d 830 (1967), Justice Douglas stated that "restrictive covenants 'constitute[ ] a restraint on alienation

political and practical matter, El Paso would never lease to appellants; and 6) wholly undeveloped desert.

The *Basiardanes* court followed *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976), in considering the *effect* that Galveston's adult business zoning laws had on access to speech protected by the First Amendment. *Basiardanes*, 682 F.2d at 1214; *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 71, 101 S.Ct. 2176, 2184, 68 L.Ed.2d 671 (1981) (distinguishing an ordinance banning nude dancing from the ordinance at issue in *Young* because the *Young* ordinance "did not affect the number of adult movie theaters that could operate in the city . . . "). Holding that Galveston's zoning ordinance "drastically impairs the availability" of protected speech and cannot withstand constitutional scrutiny as a time, place, and manner restriction, the *Basiardanes* court explained

> In the ten percent to fifteen percent of the city [from which they are] not categorically banned, adult theaters may operate only in the industrial zones at a great distance from other consumer-oriented establishments. Few access roads lead to the permitted locations, which are found among warehouses, shipyards, undeveloped areas, and swamps. These locations are poorly lit, barren of structures suitable for showing films, and perhaps unsafe. In theory they are available to adult movie proprietors and

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of property, sometimes in perpetuity, which, if valid, [i]s in reality the equivalent of and ha[s] the effect of state and municipal zoning laws. . . . ' " (quoting *Bell v. Maryland*, 378 U.S. 226, 329, 84 S.Ct. 1814, 1870, 12 L.Ed.2d 822 (1964) (Black, J., dissenting)).

> patrons, but in fact they are completely unsuited to this use.

Basiardanes, 682 F.2d at 1214; *accord Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1216-17 (N.D.Ga.1981) (without considering land price or whether land was for sale, only approximately ten of 81 sites argued to be available under Atlanta zoning ordinance are constitutionally available; other 71 sites are physically, legally, or practically unavailable). Similarly, at least some of the sites that appellants here sought to exclude from consideration as reasonable alternative avenues of communication are likely completely unsuited for appellants' purposes.

El Paso relies on *Renton*. Discussing reasonable alternatives left by Renton's zoning ordinance, the Court stated:

> The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.
>
> [The adult business owners] argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by the Renton ordinance. Brief for Appellees 34-37. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton

> ordinance "would result in a substantial restriction" on speech. [*Playtime Theaters, Inc. v. City of Renton*] 748 F.2d [527] at 534 [9th Cir.1984].
>
> We disagree with both the reasoning and the conclusion of the Court of Appeals. That [the adult business owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U.S. at 71, n. 35, 96 S.Ct. at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. *See id.* at 78, 96 S.Ct. at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact."). In our view, the First Amendment requires only that Renton refrain from effectively denying [the adult business owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Renton, 475 U.S. at 53-54, 106 S.Ct. at 932 (footnote omitted). We recite further facts concerning Renton's ordinance to fully explore the significance of the Court's passage. The Ninth Circuit concluded that "a substantial part" of the 520 acres open to adult movie theaters under Renton's zoning ordinance was unavailable for First

Amendment purposes because that *part* was occupied by a sewage treatment facility, a horse racing facility, an industrial building park, warehouse and manufacturing facilities, an oil tank farm, and a fully-developed shopping center. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir.1984), *rev'd*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The Court did not mention, let alone individually review, any of the uses found by the Ninth Circuit to be unavailable. It simply "disagree[d] with both the reasoning and the conclusion of the Court of Appeals." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

We will not read the Court's *Renton* decision to deem sewage treatment facilities as reasonable alternative avenues of communication for protected speech, especially when there is a much more plausible understanding of the Court's disagreement with the Ninth Circuit's reasoning. Renton's city council enacted its zoning ordinance before *any* adult businesses moved into the city. *Renton*, 475 U.S. at 44, 106 S.Ct. at 927. Playtime Theatres was apparently the first adult movie theater operator attempting to locate in Renton and it wanted to open only two theaters. Because there was not a great demand for adult business space in Renton, it did not have to provide a great number of alternate adult business locations in its zoning laws to meet the First Amendment's requirement of allowing "reasonable alternative avenues of communication," *id.* at 50, 106 S.Ct. at 930,[2] and not have " 'the

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[2] The Court cites *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) as authority for its test for the reasonableness of Renton's time, place, and manner restriction on speech.

effect of suppressing, or greatly restricting access to, lawful speech.' " *Id.* at 54, 106 S.Ct. at 932 (quoting *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1110 (9th Cir.1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989). In *all* of the 520 acres zoned for adult movie theaters, Renton argued that there were over 400 potential adult movie theater sites. Brief for Appellants, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), (No. 84-1360) (LEXIS, Genfed library, Briefs file). Thus, even without the "substantial part of the 520 acres" that the Ninth Circuit found to have been constitutionally unavailable, the Court obviously could have found two available sites.[3] The first and last sentences in the lengthy *Renton* passage previously quoted indicate that the Court recognized evidence of adequate alternative channels of communication for the

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Renton, 475 U.S. at 50, 106 S.Ct. at 930. In *Heffron*, though, the Court worded the second prong of the time, place, and manner test differently than it did in *Renton*. In *Heffron*, the Court stated that content-neutral time, place, and manner restrictions on protected speech must "leave open *ample* alternative channels for communication." 452 U.S. at 648, 101 S.Ct. at 2564 (emphasis added, citing cases).

[3] It is also possible that the Court disagreed with only some of the Ninth Circuit's characterizations of unavailable land, such as the "fully-developed shopping center." *Renton*, 748 F.2d at 534. There is nothing to indicate that the owners of the shopping center were barred by restrictive covenants from leasing to adult movie theaters, so, depending on the shopping center's size, it alone could have provided a reasonable alternative avenue of communication for Playtime Theatres.

speech limited by Renton's ordinance and therefore support our interpretation of *Renton*. The Court did not disagree with all of the Ninth Circuit's constitutional availability determinations. Rather, it disagreed with the Ninth Circuit's reasoning because the Ninth Circuit found that Renton's zoning ordinance allowed insufficient alternative avenues of communication exclusively based on the court's determination that much land was effectively unavailable to Playtime Theatres. *Renton* reaffirms *Young's* teaching that the only correct inquiry is whether the land that *is* constitutionally available is also sufficient to avoid suppressing access to protected speech. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (quoting *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35).

This court has cited *Basiardanes'* communication avenue suitability holding with approval even after *Renton*. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir.1988), *aff'd in part and rev'd in part on other grounds*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *see also SDJ*, 837 F.2d at 1275, 1278 (citing *Basiardanes* with approval for propositions other than its communication avenue suitability holding).[4] *Renton* expressly recognizes that El Paso cannot zone in a manner that effectively denies appellants "a reasonable opportunity to open and operate an adult theater within the city." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932. When *Renton* stated that the theater

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[4] The *SDJ* court never had occasion to address *Basiardanes'* communication avenue suitability holding because, like *Renton*, the zoning ordinance at issue in *SDJ* provided so many alternate sites that Houston's adult businesses could not legitimately argue that they were denied reasonable alternative avenues of communication.

owners "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *id.*, the Court obviously contemplated that there was a "market" in which businesses could purchase or lease real property on which business could be conducted. A real estate market that provides no opportunity to compete cannot provide a reasonable opportunity to do so. As Justice Powell's concurrence in *Young* made clear, the court's inquiry in this type of case looks to the "effect of the ordinance upon freedom of expression." 427 U.S. at 78, 96 S.Ct. at 2456. Land can be completely unsuitable for conducting an adult business if its physical, legal, or economic character prohibits its use by any such business.[5] Cities that allocate only completely unsuitable land for adult business

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[5] The standard for determining when land is economically unsuitable as an alternative avenue of communication remains obscure. We need not attempt to pierce this obscurity to decide this appeal. Appellants' proof and contentions at trial dealt exclusively with physical and legal unavailability.

However, because the line between legal and physical impracticalities and economic impracticality is thin, the economic issue may well occur on remand.

There is a reasonable, efficient way to protect sexually-oriented expression from overzealous zoning laws without guaranteeing adult business owners' profits, while remaining true to *Renton* and *Young*. It is practically irrelevant to the First Amendment's alternative avenue availability inquiry whether a particular adult business, with its management, financing, and capital costs, can make a profit and comply with a challenged zoning ordinance. The First Amendment does not guarantee speech-related businesses the right to stay in business, let alone any particular profit margin, solely by virtue of their relationship to speech. *See SDJ*, 837 F.2d at 1276-77 ("alternative sites need not be commercially viable"). The First Amendment only protects speech, so, under Justice Powell's *Young* reasoning, the

use do exactly what the Court proscribed in *Renton* and *Young: effectively* suppress protected speech.

B. JURY CHARGE SUFFICIENCY

A district judge must " 'instruct the jurors, fully and correctly, on the applicable law of the case, and . . . guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search

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economic impact of a challenged law on speech-related businesses is only significant to the extent that it suppresses people's ability to convey and receive protected messages. That a business' operating costs under a challenged ordinance would render it unprofitable does not mean that the ordinance has suppressed people's ability to convey protected messages. Likewise, if a business must charge exorbitant prices to comply with a challenged ordinance, the ordinance does not necessarily interfere with people's ability to receive protected messages. A challenged adult business zoning ordinance only has the effect of suppressing protected speech if the economic burdens that it imposes on all adult businesses has the *net* effect of limiting access to the speech.

In practical terms, this means that economic unsuitability determinations are to be made on a macro scale. Land is only economically unsuitable as a reasonable alternative avenue of communication if no adult business could possibly expect to profit by opening there. *Accord Alexander v. City of Minneapolis*, 928 F.2d 278, 283-84 (8th Cir.1991) (district court erred in striking down adult business zoning ordinance based on irrelevant evidence that ordinance's challenger could not find an economically suitable relocation site when other adult business owners found suitable relocation sites). This understanding of economic unsuitability dovetails with our statements regarding physical and legal unsuitability in that almost all forms of physical and legal unsuitability may be couched in terms of economic unsuitability.

for the truth.' " *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 424-25 (5th Cir.1985) (quoting 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2556 at 654 (1971)). Although we afford judges "wide latitude in fashioning jury instructions," we will reverse and remand " '[i]f the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.' " *Id.* at 425 (quoting *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir.1979)).

The trial court gave this jury insufficient guidance in resolving the crucial issue of what land they could consider as available for First Amendment purposes when it instructed that:

> [a]creage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance.

Like El Paso's attorneys and the staff of Harvard's Law Review, *see The Supreme Court – Leading Cases*, 100 HARV.L.REV. 100, 197 (1986), the jury could easily take this *Renton* paraphrase to mean that all land made available to appellants by the Ordinances is to be considered a reasonable alternative avenue of communication for constitutional purposes. While we recognize that the jury did not find constitutionally available all of the land that El Paso *argued* to have been open to adult businesses under the Ordinances, the jury found that approximately 565 acres of desert that does not have roads, utilities, and

structures qualifies as a reasonable alternative avenue of communication for adult businesses.[6] Given their findings and the court's charge, the jury either guessed as to constitutionally available acreage or equated constitutional availability with availability under the Ordinances, after rejecting some of El Paso's evidence as to the amount of land the Ordinances left open.

El Paso's argument that the instructions were sufficient in light of the whole charge given overlooks the fact that the portion quoted above was the *only* instruction given on reasonable availability. The city's contention that argument of counsel could supplement the charge is contrary to the court's specific instruction that the statements, objections, and arguments of counsel served only to call attention to facts and inferences that might otherwise escape notice and were not to be considered as evidence in the case.

Appellants contend that it would be unreasonable to limit relocation of adult businesses to property where it is physically or legally impossible for them to conduct business. Appellants argue that land may not be considered reasonably available for First Amendment purposes where the land: has nothing on it; has topographical or physical impediments to building; lacks street access; entails an extraordinarily high cost of building; lacks

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[6] In response to a special interrogatory, the jury stated that 1165 acres comply with the Ordinances and are reasonably available to adult entertainment businesses on which to open and operate. Garcia testified that only six hundred of the acres open to adult businesses under the Ordinances have streets, utilities, and buildings.

available utilities; is landlocked; is an area of concrete retaining walls; is a United States Customs holding area; is a cotton field and has sharecropper houses; contains large industrial warehouses; consists of sand dunes, cliffs, gullies and ponding areas, including the Jesuit Drain basin, Peter Cooper ponding area and Pullman Drain; or, is desert land. These alleged faults which appellants say make these alternative locations unreasonable depend on the land's physical qualities or characteristics.

Appellants also argue that land may not be considered available for First Amendment purposes where the land: could not receive a city building permit because it is a ponding area; is airport property where the city would never approve a lease to an adult business; is the portion of a shopping mall area required by law to be dedicated to parking; is subject to restrictive covenants that prohibit its use for an adult business; or, is subjected to deed restrictions or special contracts which proscribe adult businesses or retail use. Each of these alleged faults depends on the land's legal characteristics.

Appellants also assert that economic or business considerations affect the availability of some land as reasonable alternatives. In this case the alleged "economic" impracticability of the land is really a consequence of the land's physical or legal characteristics. Appellants do not contend that any of the available property now owned or used by other types of businesses is so expensive to purchase or lease that no adult business could economically afford it. Such a contention would have presented a more difficult issue but one which was not raised by the proof in this record. *See* n. 5 *supra.*

Appellants also complain that some property is currently in use. *Renton* responds, in part, to this contention. The fact that a business is operated on a particular parcel of property does not necessarily take the property out of the marketplace where adult businesses must fend for themselves. If, however, a business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise. Such a leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions.

As to those aspects of physical or legal unavailability that were put in issue by the evidence and required some fact determination, the court should have told the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there. We do not fault the court's use of special interrogatories requiring the jury to find the number of adult businesses in operation in El Paso on March 22, 1988; the number of sites and amount of acreage left available by the Ordinances; and whether appellants were denied a reasonable opportunity to open and operate their businesses. We do hold that the instruction language the court recast from a part of the *Renton* opinion did not respond to issues raised, nor did it adequately guide the jury in resolving the facts presented by today's case.

C. Parties' Stipulation Regarding Facial Constitutionality

Pursuant to the parties' stipulation that "[t]he ordinance in question is constitutional on its face," the court instructed the jury that "the parties agree that the adult business ordinance in question is constitutional on its face; that is, the adult business ordinance . . . does not unreasonably limit alternate avenues of communication."

The record confirms that there was substantial confusion regarding exactly what appellants meant by their stipulation to the Ordinances' facial constitutionality. Apparently, in light of *Renton*, *SDJ*, and *FW/PBS'* appellants conceded that the Ordinances are content-neutral and serve a substantial governmental interest. They never specifically conceded the facial reasonableness of the Ordinances' limitation on alternative avenues of communication. Instead, appellants repeatedly asserted that their only objection to the Ordinances is the severity of the Ordinances' limitations on their activities, not the fact that the Ordinances limit their activities. The stipulation appears to concede too much, but that did not mislead El Paso about the crux of this lawsuit.

We think that the court's instruction on facial constitutionality prejudiced appellants because it did not help the jurors decide whether the Ordinances deprive appellants of their First Amendment rights and it had tremendous potential to lead jurors to think that appellants agreed that the Ordinances provide constitutionally adequate alternative avenues of communication. We caution the district court against reusing its instruction on facial

constitutionality. The court must also reconsider appellants' claim under the Texas Constitution in light of our holding that appellants contended throughout this lawsuit that the Ordinances do not provide them reasonable alternative avenues of communication.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JEANNIE COUTTA, et al.,	X	
Plaintiffs,	X	
	X	
vs.	X	**NO.**
THE CITY OF EL PASO,	X	**EP-88-CA-127-B**
	X	
Defendant.	X	

JUDGMENT

On the 12th day of July, 1993, the above entitled and numbered matter came on to be heard; the Plaintiffs, JEANNIE COUTTA and PHYLLIS WOODALL d/b/a THE NAKED HAREM AND THE COSMOPOLITAN, CLUB, JEDJO, INC. and SMD ENTERPRISES, INC. d/b/a THE LAMPLIGHTER & RED FLAME, HIROYOSHI IWABUSHI a/k/a HENRY IWABUSHI, WIFE, LUZ IWABUCHI, and ESTELA RODRIGUEZ d/b/a CABARET and ENRIQUE VILLANUEVA d/b/a SWINGERS BOUTIQUE, appearing in person and by and through their attorneys of record, and the Defendant, THE CITY OF EL PASO, appearing by and through its attorney of record; and the parties having announced ready for trial, and a jury consisting of seven (7) duly and legally qualified and chosen jurors, having been empaneled, selected and sworn to try this case, the case proceeded to trial. Prior to commencement of the trial herein, the Court filed its Order and Memorandum Opinion on July 9, 1993 denying Plaintiffs' Motion to Reinstate a claim under Article 1, Section 8 of the Texas State Constitution.

At the conclusion of Plaintiffs case, Defendant's Motion For a Directed Verdict was denied.

On July 14, 1993, after hearing all the evidence, arguments of counsel and the instructions of the Court, the case was submitted to the jury upon a written verdict consisting of special interrogatories propounded by the Court. The jury retired to consider its verdict on said date.

On July 15, 1993, the jury returned to the Court with its unanimous verdict in response to the interrogatories submitted to them by the Court, making the following findings and rendering the following unanimous verdict.

Question No. 1

> Please find from a preponderance of the evidence the number of adult businesses in operation within the City of El Paso, Texas on March 22, 1988.
>
> Answer: 39

Question No. 2

> Please find from a preponderance of the evidence the number of sites of land within the City of El Paso, Texas which comply with the adult business ordinance in question and which were reasonably available to adult entertainment businesses on which to open and operate on March 22, 1988.
>
> Answer: 12

Question No. 3

> Please find from a preponderance of the evidence the number of acres of land within the

City of El Paso, Texas which comply with the Adult business ordinance in question and which were reasonably available to adult entertainment businesses on which to open and operate on March 22, 1988.

Answer: 12

Question No. 4

Considering all circumstances in existence on March 22, 1988, including, but not limited to your findings as to the number of adult businesses in operation in Question No. 1, the sites available in Question No. 2, and the acres available in Question No. 3, Do you find from a preponderance of the evidence that the adult business ordinance of the City of El Paso effectively denied these Plaintiffs a reasonable opportunity to open and operate their entertainment business?

Answer: Yes

Question No. 5

Please find from a preponderance of the evidence the number of adult businesses in operation within the City of El Paso, Texas on November 15, 1992.

Answer: 22

Question No. 6

Please find from a preponderance of the evidence the number of sites of land within the City of El Paso, Texas which comply with the adult business ordinance in question and which

were reasonably available to adult entertainment businesses on which to open and operate on November 16, 1992.

Answer: 12

Question No. 7

Please find from a preponderance of the evidence the number of acres of land within the City of El Paso, Texas which comply with the Adult business ordinance in question and which were reasonably available to adult entertainment businesses on which to open and operate on November 16, 1992.

Answer: 12

Question No. 8

Considering all circumstances in existence on November 16, 1992, including, but not limited to your findings as to the number of adult businesses in operation in Question No. 5, the sites available in Question No. 6, and the acres available in Question No. 7, do you find from a preponderance of the evidence that the adult business ordinance of the City of El Paso effectively denied these Plaintiffs a reasonable opportunity to open and operate their entertainment business?

Answer: Yes

Said jury findings were duly received by the Court and the jury was dismissed on July 15, 1993 and their unanimous verdict filed among the papers in this cause with the Clerk of the United States District Court for the Western District of Texas, El Paso Division, on the 15th day of July, 1993. Based upon said verdict,

It is hereby **ORDERED, ADJUDGED AND DECREED**, that the zoning ordinances of the City of El Paso, Texas that regulate the location of Plaintiffs adult businesses, do not provide Plaintiffs with a reasonable opportunity to open and operate their adult entertainment businesses and they are therefore unconstitutional, as applied to these Plaintiffs.

It is further **ORDERED, ADJUDGED AND DECREED**, in accordance with the unanimous verdict of the jury, and independent of such jury findings, that, as a matter of law, the adult business ordinances in question are unconstitutional in that they fails [sic] to provide the Plaintiffs with a reasonable opportunity to open and operate.

It further **ORDERED, ADJUDGED, AND DECREED**, that the Defendant, its agents, servants, employees, attorneys and others acting on its behalf are hereby permanently enjoined from enforcing the provisions of the adult business zoning ordinances of the City of El Paso, Texas against these Plaintiffs to the extent that such enforcement is based upon a contention that Plaintiffs current business locations do not meet the location requirements of the ordinances.

Based upon the Stipulation of the parties made in open court, it is further **ORDERED, ADJUDGED AND DECREED** that Judgment shall be entered herein in favor of each of the Plaintiffs separately against the City of El Paso, Texas in the amount of $1,500, for a total judgment of $7,500. Plaintiffs shall be entitled to recover their costs herein.

SIGNED this _____ day of _____, 1993.

/s/ _____
LUCIUS D. BUNTON, III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8674

PHYLLIS WOODALL, ET AL.,
Plaintiffs,

PHYLLIS WOODALL, ET AL.,
Plaintiffs-Appellees,

versus

THE CITY OF EL PASO, ET AL.,
Defendants,

THE CITY OF EL PASO,
Defendant-Appellant.

No. 93-8739

PHYLLIS WOODALL, ET AL.,
Plaintiffs,

PHYLLIS WOODALL, JEANNIE COUTTA d/b/a/
THE NAKED HAREM, JEDJO, INC.,
SMD ENTERPRISES, INC.,
d/b/a The Lamplighter d/b/a Red Flame
and MARC DIEDRICH, President,
Plaintiffs-Appellants,

versus

THE CITY OF EL PASO, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 04/14/95, 5 Cir., ___ F.3d ___)

(June 22, 1995)

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert Parker
United States Circuit Judge